PUBLIC PROSECUTOR

v.

NERMAL SINGH A/L RATTAN SINGH

HIGH COURT, IPOH
DATO' PEH SWEE CHIN SCJ.
[CRIMINAL TRIAL NO. 58-2-86]
16 JULY 1993

CRIMINAL LAW: Dangerous Drugs - Trafficking - Presumption of custody and control - Defence tendered of interchanging of clothing between family members - Accused wearing brother's clothes at material time - Heroin in pockets - Whether presumption rebutted - Dangerous Drugs Act 1952.

The accused Nermal Singh (NS) was arrested after a body search was conducted on him and 5 plastic packets were found, each containing heroin. All in all the amount totalled to more than 15 grammes and thus the presumption of trafficking arose against him.

The accused denied the charges and explained that he was in the habit of interchanging clothing with his brother Upkar Singh (US) who had been discharged from the army for drug offences. The clothing which he had on at the material time of his arrest belonged to his brother and he claimed he had no knowledge that the drugs were in the clothing. US also admitted and supported the accused's contention and claimed the drugs to be his.

Held:

[1] The jeans worn by the accused were tight-fitting, as such the accused could not have been unaware of the plastic packets in the trousers of the pockets. Further the accused did not reveal the alleged fact that the clothing and the drugs belonged to the accused's brother until his appearance in Court, several years after the arrest. The Court finds his reason for silence difficult to believe, that reason being - his father had told him to keep silent for his brother's sake.

[2] The evidence at the end of the defence case does not rebut on the balance of probabilities, the statutory presumption of possesion/ trafficking of heroin.

[Accused found guilty as charged; Sentenced to hang].

Cases referred to:
*Munusamy v. PP [1987] 1 MLJ 492 (**refd**)*
*Su Ah Ping v. PP [1980] 1MLJ 75 (**refd**)*

For the Public Prosecutor - Murtazadi, DPP
For the accused - Paramjit Singh

JUDGMENT

Peh Swee Chin SCJ:

At about 5.40 p.m. on 20 May 1985, Insp. Mohamad bin Yahaya of the Anti-Narcotics Division received information about a Sikh, a subject for his arrest. He then went to Jalan Hume, Ipoh with DPC Mohamad and DPC Yunan where they waited for that person. At 6.50 p.m. he saw a Sikh walking towards a shop. They then arrested him in front of No. 75, Jalan Hume. The Sikh was wearing a pair of grey jeans, green turban and a shirt which looked like grey in colour. He conducted a search on the Sikh and found in his left pocket of his trousers, 2 plastic packets and in his right pocket, 3 plastic packets, and each of all these packets contained a substance suspected to be heroin. He marked the said 2 plastic packets as "M1" and "M2" and the said 3 plastic packets as "M3", "M4" and "M5" respectively. He brought the Sikh back to New Town police station (inside the city of Ipoh). After they found the said plastic packets, the Sikh trembled, and he was alone when arrested. Insp. Mohamad also found a key to a motor-cycle at the scene which was also taken to the police station. He lodged a report at the New Town police station from where he later went back to his own office. He made the said markings on the said plastic packets as exhibits. He then handed over to Insp. Raja Zahudeen the Sikh, the exhibits and the key at 7.45 p.m. on 22 May 1985. Just before the Sikh whom he identified as the accused in the dock, was arrested there was no traffic at Jalan Hume at that time, and he suspected the Sikh to be the said subject for his arrest. He later on 5 November 1985 returned to the scene of arrest to show it to Insp. Raja Zahudeen.

When cross-examined, Insp. Mohamad said the accused looked frightened and nervous after the finding of the exhibits on him. He agreed that Sikh wore a green turban like the ones worn by Sikhs in the armed forces.

Insp. Mohamad also identified in Court the exhibits which he had so marked i.e. the 5 plastic packets.

DPC Mohd. Sarif and DPC Yunan who accompanied Insp. Mohamed also gave similar evidence about the arrest of the accused.

Insp. Raja Zahudeen confirmed about the exhibits received from Insp. Mohamad, and among other things, he put the said 2 plastic packets marked "M1" and "M2", into an envelope which he himself marked as "Z1", and the said 3 plastic packets marked with "M3", "M4" and "M5" respectively into another envelope which he himself marked as "Z2". He sealed both envelopes with the words "Kerajaan Malaysia". On 22 May 1985, he handed the 2 envelopes marked "Z1" and "Z2" to Cik Lam Yoke Ching of Chemistry Department for which he received a receipt. He took the same exhibits back from Cik Lam Yoke Ching (the Chemist) on 6 August 1985. He later drew a sketch plan. About the motorcycle he received from Ins. Mohamed, he sent it back to the father of the accused, who had since passed away. Raja Zahudeen identified in Court the exhibits "Z1" and "Z2" and also "M1" to "M5".

Cik Lam, the chemist who was prosecution witness No. 1 stated that she was a chemist with a degree of B.Sc. (Hons) in chemistry from University of Malaya and a M.Sc. in forensic science from the University of Strathclyde in Scotland. She had also attended a training course in narcotic drugs such as heroin in Hongkong with the course being sponsored by U.N. She had worked for 17 years in the Department of Chemistry with 16 years of working experience in the analysis of dangerous drugs such as heroin.

She confirmed she received the 2 envelopes marked "Z1" and "Z2" from Raja Zahudeen. The said 2 plastic packets she found inside "Z1" contained, according to her, 22.65 grammes of pinkish granular substance which on analysis was further found to be 8.27 grammes of heroin. She found the said 3 plastic packets to contain 34.01 grammes of heroin. She found the said 3 plastic packets to contain 34.01 grammes of pinkish granular substance which she analysed and found to be 12.43 grammes of heroin, all the heroin found was as listed in the First Schedule of the Dangerous Drugs Act 1952. She then sealed both "Z1" and "Z2" (exhibit numbers given by Court being P3 A & B) with her departmental seal viz. Jabatan Kimia Ipoh 2. While giving evidence the chemist tore the seal in Court and identified "Z1", "Z2", "M1" to "M5" respectively.

The chemist was subjected to very lengthy cross-examination from which the Court was convinced that her analysis, both qualitatively and quantitatively, was correct. It would not be necessary to set out the details of the cross-examination of the chemist, bearing in mind especially the dictum of the Supreme Court in *Munusamy v. PP* [1987] 1 MLJ 492 about the undesirability of lengthy cross-examination of chemists in drug cases for reasons stated therein. There had been a suggestion from learned defence Counsel about a possible expert to be called by the defence to counter the evidence of Cik Lam, the chemist herein.

Despite very skilful submission of no case to answer which the Court, however, was unable to accept, the Court was satisfied that the accused had custody or control of the 5 plastic packets recovered from his pockets which contained the heroin as in the charge and the statutory presumption of possession of the heroin therefore arose against him. Further, since the amount of heroin recovered was more than 15 grammes, the statutory presumption of trafficking also arose against him. The Court was satisfied beyond a reasonable doubt that the substance proved to be the heroin as contained in the 5 plastic packets which were identified by Insp. Mohamad in Court was the same that was recovered from the scene; handed over to Insp. Raja Zahudeen, and in turn handed over to the chemist Cik Lam. The Court could not insist on 100% proof from the prosecution as such 100% proof was equivalent to proof beyond a shadow of doubt. Were it so, our criminal justice system would collapse. One hundred percent proof appeared to be the Court's impression gleaned from learned Counsel's submission of no case to answer.

The accused chose to give evidence on oath. He said that when he was arrested, he did not run away and when the drug was found on him, he was shocked all right because he did not know that the drug was in the jeans he was wearing.

He said there were 2 rooms in his house, one of which was occupied by his parents, and the other by himself and his two brothers, called

Jernail Singh and Upkar Singh respectively. In his room there was no wardrobe and clothes were hanging on the wall by the nails. He and his 2 brothers hung their clothes there, such as jeans, trousers, shirts and singlets.

He said further it was common among him and his 2 brothers to interchange clothings. (i.e. to share one other's clothes). The pair of jeans (P12) (as identified in Court by Insp. Mohamad as the pair worn by the accused) was not his. Trousers and jeans owned by him did not have any number, he said, but P12 bore the registration number of a motor-cycle written thereon (as found by the Court to be 35160 on the cover of the inside pocket in the front part of P12). P12, he said belonged to Upkar Singh who was involved in many drug cases and had been imprisoned and also under police supervision. He did not tell the police that the pair of jeans (P12) did not belong to him because the next day after his arrest, his father asked him not to tell the police for otherwise his brother Upkar Singh would be arrested. His father died in March 1987. Just before his arrest, he was asked by his father to take his father's motor-cycle parked there at the scene of arrest because Upkar Singh had rung up the house earlier asking them to collect the motor-cycle left by him there at the scene as he was not coming back. When he went to collect the motor-cycle he was arrested. The accused identified a wallet (produced by defence) as his and it contained his driving licence and identity card. The wallet was left in his own trousers (at home). The turban and the pair of jeans (which he was wearing at the time of arrest) did not belong to him but to his brother Upkar Singh who was discharged from the armed forces for drugs.

When cross-examined, he said he hung his clothings on one of the 2 or 3 strings in his room. Upkar Singh had marking on P12 with the number of 3516 because he sent his clothes to a laundry and because the said number was the number of his father's motor-cycle. His father did not wear jeans. The accused did not send his clothes to the laundry.

He was wearing Upkar Singh's jeans because the 3 brothers used to wear one other's clothes. Upkar Singh had gone earlier to Butterworth to look for a job that morning and left his house on the said motor-cycle which he left at the shop (where it was seized by the police). He was given by his father the key to the said motor-cycle to collect the latter. He denied having gone himself to Butterworth that morning for getting the heroin there and was arrested when he came back. He maintained that the said pair of jeans he was wearing belonged to Upkar Singh.

Upkar Singh gave evidence to say he was a plumber and was formerly in the army between 1973 and 1978. He was discharged from the army for drug offences.) He was detained earlier at Pulau Jerjak for 2 years from 1980. Another brother called Gurdial Singh was studying in India.

Both parents had since passed away after the arrest of the accused. It was common he and his brothers in the same room wore one another's clothes. Their clothes were hanging by nails and strings in the room. P12, (the pair of jeans worn by the accused at the time of arrest) was his and he had the number of 3516 on the jeans for the dhoby's purpose. He confirmed he had gone to Penang that morning and had left the motor-cycle in Jalan Hume. While in Penang, he rang up saying that he would not be returning so that the motor could be collected (from the shop at Jalan Hume) because his father would have wanted the motor-cycle for his night's work. He admitted that P12, the pair of jeans, belonged to him and the drug in P12 also belonged to him. He had bought the drug at Kg. Jawa, Ipoh. When he returned home, his father was angry and beat him up.

When cross-examined, he said to the effect that the turban the accused was wearing belonged to him while he was in the army. He wore it for the first 3 or 4 years in the army and later had his hair cut. When his parents were alive, he wore it. He had hung the pair of jeans (P12) behind the door to the room when he left for Penang. The motor-cycle was left by him there in Jalan Hume and had not been driven (used) by the accused that morning for the purpose of taking him to Jalan Hume because accused had work to do in his farm in the morning, so did his father.

He had chosen the dhoby number for identification purpose. He did not tell the police that the drug found on the accused belonged to him because he was scared. He put the 5 packets of drugs into P12.

Learned defence counsel in his final submission took issue with the point that there was no evidence as to how the exhibits were kept, first by Insp. Mohamad before he handed the same to Insp. Raja Zahudeen, secondly how they were kept by chemist Cik Lam before she analysed them and handed back to the Insp. Raja Zahudeen, and thirdly how they were kept by the store-keeper who must have received the exhibits from Insp. Raja Zahudeen before they were brought to Court some 5 years later.

The Court saw chemist Cik Lam open the exhibits sealed with the seal of the Chemistry Department in Court. The exhibits all bore the same markings made by Insp. Mohamad and Insp. Raja Zahudeen respectively. Insp. Mohamad who recovered the said 5 plastic packets at the scene was able to identify the same in Court. The Court had entertained no doubt as to the identity of the exhibits. One recalls the ratio decidendi of *Su Ah Ping v. PP [1980] 1 MLJ 75* where it was held that in such similar circumstances it would not be necessary to call to testify in Court everybody who had handled the exhibits in a case.

Referring to the evidence of the accused and Upkar Singh; listening to them and watching them, the Court found that it did not cast any reasonable doubt on the prosecution evidence that the drug as charged. The evidence did not cause any real hesitation in the Court's mind as to whether the drug could have after all belonged to Upkar Singh. With the said 5 plastic packets in the pockets of the pair of jeans worn by the accused, the jeans being tight-fitting sort of trousers, it was submitted by the learned Deputy to the effect that the accused could not have been unaware of them as they would have aroused the curiosity of the accused enough to find out what they were. The Court found considerable force in this submission. The Court found it very difficult to believe that the accused was not aware of the drug.

Why did not the accused or Upkar Singh tell the police that the drug had belonged to Upkar Singh and not the accused until several years later when it was first revealed in Court? The Court found it very difficult to believe that the accused had kept mum about this because his father had told him to do so, on the next day after his arrest. Why did'nt the accused tell the police on the very day of his arrest if one were to believe that his father's words had greater force than the law or the tremendous danger the accused faced? I will deal with Upkar Singh's evidence later on.

Also, the Court found it very difficult to believe the 3 brothers shared one other's clothes or all the clothes of the 3 brothers were used in common by one and all, usually. The accused and Upkar Singh were not really of the same height and same build as the Court observed that the accused was taller or stouter. The family of the accused were not really living in abject poverty so that they had to share one another's clothes, not being able to buy separate clothings for the 3 brothers respectively. Another brother, called Gurdip Singh was studying in India then and expenses for that had to be provided. The family had a telephone and a motor-cycle. The Court found it possible that the pair of jeans could have been given to the accused by Upkar Singh or Upkar Singh could have discarded the jeans and the accused took over for his own exclusive use. It is more likely that the accused used the jeans and had sent the same to the dhoby as it could prove difficult for his mother to wash clothing like jeans, thick and heavy.

As regards the evidence of Upkar Singh owning up to the ownership of the drug, and preparing to take the rap for it, the question was: why did'nt he do so earlier, shortly after the arrest of the accused? It looked like a rescue operation which was an afterthought. It could not be ruled out the that Upkar Singh took a gamble which, if successful, would free his brother, though putting himself in a position from which he however, expected he could extricate himself with a fate less than the capital punishment, and all this might sound churlish in view of the gravity of the offence involved herein. To put the matter more bluntly, Upkar Singh could retract what he had said in another Court. One, however, could not ignore that it took a noble spirit to have done what Upkar Singh had done for his brother, but alas, for a wrong cause.

The Court found at the end of defence, on the evidence that the accused had not, on the balance of probabilities, rebutted the statutory presumption of possession of the heroin in question neither had he rebutted, also on

the balance of probabilities, the statutory presumption of trafficking by virtue of the weight of the heroin exceeding 15 grammes in weight.

The accused was therefore found guilty, and convicted as charged and was sentenced to death by hanging according to law.

SYED HUSSEIN BIN SALIM ALATTAS & 2 ORS (TRUSTEES OF THE ESTATE OF SYED HASSAN BIN AHMAD ALATTAS)

v.

SYARIFAH RUGHAYAH BTE IDROS

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD. NOOR J.
[ORIGINATING SUMMONS NO. 24-551-1992]
19 JULY 1993

LAND LAW - Removal of private caveat - Proprietors of land applied to remove caveat - National Land Code 1965 s. 327 - Application resisted by caveator - Whether caveator had caveatable interest in land - Whether interest of caveator raised serious issue to be tried - Onus of proof.

LAND LAW - Procedures relating to entry of private caveats - National Land Code s. 323(2) - Requirements of section not complied with - Whether caveator disqualified from lodging caveat - Caveat extended by Court at ex-parte hearing - Material facts not disclosed at hearing - Whether non-disclosure constituted ground for removal of caveat - Undue delay in lodging caveat - Effect.

The defendant in this case had entered a private caveat over a parcel of land of which the plaintiffs were the registered proprietors and trustees. The defendant lodged the caveat to protect her purported beneficial interest in the land which she claimed to have arisen in the form of a trust. However, in her application for the entry of the caveat, which was made under section 323(1)(b) of the National Land Code 1965, there was no mention whatsoever of this purported trust.

Subsequent to this lodgement, the defendant applied *ex-parte* to the Court for an extension of the caveat, and by an order dated 4 July, 1992 the application was granted and the caveat accordingly extended. The facts however showed that in the application for the said extension, certain material facts were not disclosed to the Court by the defendant. And the facts further showed that the defendant waited for 21 years before asserting her claim in respect of the alleged interest in the land.

The plaintiffs applied, *inter alia*, for an order that the order of court dated 4 July 1992 be set aside and for a further order that the caveat be removed from the relevant Registry.